United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

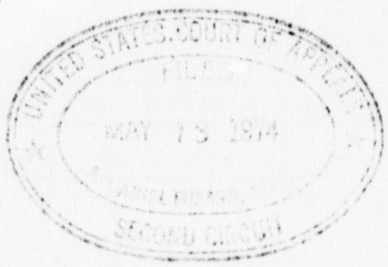
74-1353

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- FRANK J. McKIBBON and ROBERT L. DiGREGORIO, Appellants.	Docket No. 74-1353

BRIEF FOR APPELLANT
ROBERT L. DiGREGORIO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the incredibility of the key witness for the prosecution made it reversible error for the Court to deny an examination of the witness, a new trial, and exclusion of certain evidence.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jacob Mishler) entered on March 15, 1974, after a trial before a jury, convicting appellant DiGregorio of one count of extortion, in violation of 18 U.S.C. §§894, 2, and sentencing him to a one-year term of probation.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal pursuant to the Criminal Justice Act.

Statement of Facts

The indictment charged that Frank McKibbon, as aided and abetted by appellant DiGregorio, extorted money from Aram Carapetyn.* Prior to trial, defense counsel sought to have Carapetyn, the critical government witness, examined to determine his mental stability. The motion papers** alleged, in

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*The indictment, annexed as "B" to appellants' joint appendix, charged DiGregorio in the first of two counts. McKibbon, the co-defendant, was found not guilty as to the second count of the indictment.

**The notice of motion and affidavits are Document #6 to the record on appeal.

essence, that those acquainted with Carapetyn believed his bizarre behavior demonstrated either a lack of intelligence or mental instability which left him with a lack of a sense of reality and flights of mental fancy.

The Government countered by arguing that various FBI agents had interviewed Carapetyn and found him rational, logical, and credible; that other sources confirmed the shylocking activities of McKibbon; and that the District Court had no "inherent power" to order such an examination.*

The District Judge denied the motion, concluding he had no inherent power to grant the examination.

During trial, just prior to the cross-examination of Carapetyn, counsel again raised the issue of Carapetyn's stability. Judge Mishler stated he would permit counsel to introduce proof of Carapetyn's reputation for lack of truthfulness (153**). Judge Mishler ruled that evidence of prior bizarre and strange behavior could be used as the basis for expert testimony. Thus, a psychiatrist could be told the behavior and, considering that as well as Carapetyn's courtroom behavior, offer an opinion as to whether such behavior was symptomatic of a mental disability which impaired the

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*The Government's papers in opposition to the motion are to be part of a supplemental record on appeal, Documents # and #

**Numerals in parentheses refer to pages of the transcript of the trial.

ability to tell the truth (155). The judge indicated that he would do nothing else, even when advised that Carapetyn refused voluntarily to see a psychiatrist (155-56).

A. The Government's Case

The Government's case depended upon the testimony of Aram Carapetyn. Carapetyn's testimony was that he knew McKibbon from around the Kings Bay Car Service (273) and that, through conversation, he knew McKibbon would lend money (273). In July 1971 Carapetyn borrowed $100 from McKibbon to pay his rent (78-79). At that time McKibbon took Carapetyn's address, telephone number, and automobile license number (81). McKibbon told Carapetyn to pay five dollars per week, which Carapetyn did from July to November 1971 (80). According to Carapetyn he stopped paying, and several weeks later McKibbon told him that the debt was $150, with weekly payments of $10. Carapetyn understood the payments to be toward the interest only, and that the principle would remain unchanged (81). From November 1971 to March 1972 Carapetyn made weekly $10 payments (82).

In March 1972 McKibbon met Carapetyn at the car service, requested that he go outside, and they entered an adjoining store belonging to a man named "Jack" (83), where McKibbon told him the new principle was $450, with weekly payments of $20 expected (82).

Carapetyn protested the new arrangement, saying he had paid more than $100, and would pay no more (83). At that point McKibbon punched Carapetyn in the stomach, face, and nose (131), causing a nosebleed (83). McKibbon said he could not take Carapetyn to court (84), and threatened that next time somebody else would do the punching (83, 84). Carapetyn paid the $20, thinking it would help matters, and he did so until July 1972 (84).

After Carapetyn stopped payment, McKibbon came to him again. McKibbon reported that the matter was out of his hands and that Carapetyn would have to discuss it with McKibbon's boss. Later McKibbon told him his principle would be $800, with $25 weekly payments (85). McKibbon said if Carapetyn did not pay he would be hurt (86).

Carapetyn testified that on July 19, 1973 (177), he went to the FBI and made a statement. From then on the FBI advised him of what to do.

On July 25, 1973, McKibbon telephoned Carapetyn and told him to pay or get his arms and legs broken (87).

On August 3, 1972, McKibbon and appellant DiGregorio (known as "Bob"*), in a car, accidentally met Carapetyn (88-89). During the conversation which followed DiGregorio stood behind Carapetyn near the car. McKibbon asked what happened to the

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*At the trial Carapetyn was unable to identify appellant DiGregorio as "Bob" until he was told to look at counsel table (88-89).

money (138), and asked Carapetyn to get into the car. Carapetyn refused (88, 139). Carapetyn told McKibbon that he had a $400 check coming which had not cleared (88) and that he would meet McKibbon about it the next day (88).* Carapetyn stated he had no prior dealings with appellant DiGregorio, but that he knew him from the car service (199) and thought he was nice. He stated that he did not know anything to lead him to believe appellant was involved with lending money, and never called him a shylock (203).** He said that he was not afraid of appellant DiGregorio (180), and that the meeting offered nothing to be afraid of (149).

On August 4, Carapetyn was supplied with a recording device which was concealed on his body (90).***

At the August 4 meeting, Carapetyn told McKibbon that the check had not yet cleared and that he needed another day (91). McKibbon told Carapetyn that if the check did not clear he had better leave town. DiGregorio said, "I suggest you do just that" (183, 92). McKibbon said at some point in the conversation, If I didn't hate somebody else more than you, I would kill you" (182). Carapetyn testified that at this meeting he lost faith in DiGregorio (184).

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*This story was created by the FBI agents (286).

**The agents' report indicated that Carapetyn had called appellant DiGregorio a "Shylock."

***The use of the tape recording device was confirmed by FBI agents.

The jury was permitted to listen to the tape recording of the August 4 conversation while reading a copy of the transcript made from the tape by agents. The transcript showed a lengthy discussion of the $400 check, and concluded:

FM Aram...if you go past Wednesday, run away. That's all I can tell you. Runaway...
AC Take off...go...
FM Right
AC ...don't come back...huh...is that what you say, BOB?
BOB I would suggest it, yes.
AC You suggest it...
FM I would suggest it, really. If you don't come Wednesday...
AC ...by Wednesday
FM ...I might do something the (wrong way?)..
AC I'm finished. Listen, I...I...uh ...no, they should have it by then.
FM If there wasn't somebody I hate more than you right now...
AC Uh-huh...
FM I'd fucking kill you. All right. (inaudible) Somebody else I want to save all my fucking frustrations for him.

Another meeting occured on August 8. Prior to this meeting Carapetyn was again equipped with a tape recorder. Appellant DiGregorio arrived and Carapetyn told him he would try to cash in a $1,000 insurance policy to pay the $900, but that he needed more time. Appellant said Carapetyn should wait for McKibbon (94). Appellant made no threats and did nothing to make Carapetyn afraid (190).

When McKibbon arrived, Carapetyn told him about the insurance policy. DiGregorio was not present during this conversation (190), and Carapetyn was not afraid because FBI agents were nearby (192). McKibbon started to search Carapetyn because he suspected the presence of a tape machine (95). Finally, an agent who identified himself as a friend of Carapetyn came and removed Carapetyn from the scene.*

During his testimony, Carapetyn related, over objection by defense counsel, an incident concerning a Marty Shuffles. At some time, "maybe" in March, Carapetyn saw Marty in a car being driven by McKibbon. While driving with the left hand, McKibbon was hitting Marty with his right hand.

Carapetyn continued, saying that Shuffles was in his seventies and about five feet four inches tall. The event took place while McKibbon's car was moving (115) and while Carapetyn was driving his car in the opposite direction (116).

The Court permitted this testimony as evidence of McKibbon's intent to instill fear in Carapetyn (102-03). Counsel argued that, assuming McKibbon hit Marty, that was not evidence of use of violence to secure repayment of a loan (105. The

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*The jury also listened to the tape of this conversation. No threats were made.

Court ruled that a propensity and a reputation for violence were sufficient bases for the evidence (106).

FBI Agent Parks testified that on August 4, 1972, Carapetyn and McKibbon talked on the street, that DiGregorio later joined them (340), and that they all went into a candy store (341).

FBI Agents Seneff and Young testified that they listened to the conversations between Carapetyn and DiGregorio on August 8, that appellant then parked his car and stayed in it for awhile, went into the drug store, and remained in the vicinity. McKibbon arrived some time later (292-95).

Agent Parks testified that in a post-arrest statement McKibbon stated he lent Carapetyn $900 and that McKibbon believed Carapetyn was stalling on payment. When on two occasions Carapetyn failed to repay, McKibbon threatened he would "beat the shit out of him" (346-47). McKibbon said appellant did not know of any loans to Carapetyn (348) and that, at the first meeting, McKibbon and Carapetyn were alone and that appellant DiGregorio was at the second meeting (347).

In appellant DiGregorio's post-arrest statement, he said he did not know anything about McKibbon's activities (323) and that although he was around during the August 4 and August 8 conversations he did not listen to or participate in them (324).

Harold Koenig testified that he borrowed $200 from McKibbon (399) at interest of $5.00 per week per hundred dollars

(400), and that although he missed a few weeks' payments McKibbon never threatened him (410). Koenig testified that in the community he never heard anyone say anything against McKibbon's reputation for honesty or integrity or in connection with a reputation for violence (419).

B. Problems with Carapetyn's Testimony

During the course of Carapetyn's testimony on cross-examination and the presentation of other evidence it became apparent that there were inconsistencies affecting the witness' credibility.

In his July 19, 1972, statement to the FBI agents, and in his testimony before the grand jury (134, 136), Carapetyn never mentioned the beating which allegedly occurred in Jack's store. He did not mention the beating at all until the Assistant United States Attorney interviewed him in preparation for trial (169). Further, Carapetyn did not tell the agents that at the August 3 meeting appellant, standing behind Carapetyn, requested that he get into the car. This type of information, testified Agent Parks, is usually volunteered (352).

By way of explanation, Carapetyn said he didn't tell the agents about the beatings because his friend Jack asked that he not do so (165). He decided, he said, to tell about the meeting when the Assistant United States Attorney advised him to reveal all he knew.

Further, as revealed at trial, the tapes of the conversations of August 4 demonstrate that Carapetyn was the first to mention the word "kill" when, in negotiating for time, he said, "Hey, Frank, don't kill me yet. Just give me a chance 'til Tuesday" (220). Carapetyn said that his comment must have been in response to a prior statement (223).

Agent Seneff, one of the FBI agents listening in on the conversation through a receiver, did not recall any threats to kill Carapetyn prior to Carapetyn's mentioning the possibility on the tape.

Also on cross-examination it was revealed that Carapetyn had borrowed money, had about $1,000 in debts, and a judgment had been entered in New York County Civil Court for $473.50 (320).*

C. The Defense

Appellant testified he knew McKibbon from the car service (490), and that McKibbon, like other people there, would lend others small amounts of money (491). On August 3, 1971, McKibbon and appellant co-incidentally met Carapetyn. At that time McKibbon said Carapetyn owed him money (494). Before this, appellant was unaware of the debt (491-92). McKibbon called Carapetyn over to the car; appellant got out (494-95). Appel-

*Carapetyn initially denied this.

lant heard McKibbon ask Carapetyn for money (496) and heard McKibbon tell Carapetyn to be at the car service the next day (497).

The next day appellant and McKibbon drove to the car service and met Caraptyn. McKibbon got out of the car while appellant parked (500). Appellant returned to the vicinity of the other two and then they went to a candy store (500). Appellant overheard McKibbon asking about the money and check, and appellant made some side comments (503).

On August 8, appellant inadvertently met Carapetyn and, knowing he was to meet McKibbon, asked if he had the money and where his car was (506). Appellant asked Carapetyn to wiat until McKibbon arrived (507). When McKibbon arrived, DiGregorio stood back, and could overhear only certain parts of the conversation (509). He heard Carapetyn mention an insurance policy and McKibbon ask about the car.

McKibbon testified that Carapetyn borrowed $100 for rent (535), then $350 to fix hi car, and then $450 to get insurance for his car (535-38). As to the conversations, McKibbon reiterated the contents of the conversations as to the check, the car, and the insurance policy. He denied threats to kill Carapetyn (541), referring to his belief that Carapetyn's remarks were a joke (542).

McKibbon acknowledged saying he was going to "punch the shit" out of Carapetyn, but didn't consider it an extortionate threat, only a statement made in an argument (554).

D. Verdict and Post Verdict Motions

After deliberations, the jury found appellant and McKibbon guilty.

Subsequently, counsel for McKibbon made a motion for a new trial on the grounds of newly discovered evidence. The basis of the motion was an affidavit from Jack Levine, in whose store the alleged beating of Carapetyn took place. In that affidavit Levine said that he never witnessed McKibbon beat Carapetyn, nor did he tell Carapetyn not to tell anyone about it.

A hearing was held on the motion. At that hearing McKibbon testified that he knew who "Jack" was and that he told his lawyer on the day the testimony was given (Minutes of January 18, 1974 at 11). McKibbon went to Jack's store, but it was closed (Minutes of January 18, 1974 at 12). After that, McKibbon left word around the neighborhood that he was looking for Jack (January 18, 1974 at 13). However, this may have occured after the trial (January 18, 1974 at 10).

Jack Levine also testified. He reaffirmed the statements in the affidavit. He also added that he had been in business with Carapetyn but that Carapetyn had never put any money into the partnership (Minutes of January 18, 1974 at 22), but drew money from it (Minutes of January 18, 1974 at 26).

At the close of the hearing, the judge stated:

> This is not the kind of case, in spite of the recording, in spite of all the evidence of the Government, where the Government case was really airtight or close to it or weighty. It bothers me that this evidence that may very well, may not be, that this evidence may be the determinative factor. I get many motions for new trials, I don't recall granting one. This one is the closest that moving parties come to merit.

The Judge inquired why, on evidence so critical, the government did not seek out Mr. Levine. The Assistant United States Attorney argued that the government did not have time to find him because there was only one agent on the case. (Minutes of January 18 at 35). The Judge indicated that the defense did not know about Jack until the Carapetyn testified at trial (Minutes of January 18 at 40).

It must here be noted that prior to the trial, during the colloquy on the admission of the tapes and transcripts Judge Mischler inquired as to the identity of the "Jack" mentioned in the transcript of the conversation of August 8. The Assistant United States Attorney then stated:

> He is a local store owner, I believe your Honor. That is irrelevant conversation. That is an irrelevant name.

Judge Mischler denied the motion for a new trial (the opinion is annexed as D to appellant's appendix) finding that although the information was not cumulative, due diligence was not used to find the evidence prior to end of the trial nor would it have resulted in a different verdict.

ARGUMENT

THE FAILURE OF THE JUDGE TO GRANT RELIEF REQUESTED BY THE DEFENSE RESULTED IN A TRIAL IN WHICH IT BECAME APPARENT THAT THE TRIER OF FACT COULD NOT PROPERLY EVALUATE THE CREDIBILITY OF THE KEY WITNESS AND THUS APPELLANT's GUILT.

The critical testimony in this case was that of Aram Carapetyn. Carapetyn said that he had borrowed $100 from Frank McKibbon. He reported that McKibbon accused him of failing to pay the debt and raised it from $100 to $150 to $450 and then to $900. He reported that McKibbon threatened and beat him and that on three occasions appellant was present and implicitly offered his assistance to McKibbon.

A reading of the record demonstrates that this testimony was internally inconsistent, untrue or incredible as to several critical points. The testimony by Carapetyn that McKibbon had beaten him in the presence of a man named "Jack" did not appear in any pre-trial statement, although he had been in contact with the F.B.I. agents for about a month prior to August 8. In fact, Agent Parker testified that this was information usually related voluntarily, thereby accounting for the failure of the agents to inquire about actual violence. Further, Carapetyn's excuse for failing to

reveal the testimony was that "Jack" told him not to tell anyone. This excuse seems incredible in light of Carapetyn's plea for help from the F.B.I.

Next, although Carapetyn testified that McKibbon had threatened to kill him on August 4, and that McKibbon had made the first threat, the tape of the conversation and transcript made from it do not support that version of the events. In fact, Carapetyn, knowing he was recording the events was the first person to use the word "kill" and McKibbon merely followed his lead.

In addition, Carapetyn denied having a judgment against him for money owed. Carapetyn's characteristic of borrowing money and of not repaying debts was critical to the defense. Carapetyn's denial of owing money was proved to be false for counsel established that a judgment had been rendered against Carapetyn in the Civil Court, New York County.

It was also shown that prior to trial Carapetyn never mentioned that appellant stood behind or adjacent to Carapetyn on August 3 or that he stood behind him in the candy store on August 4.

In contrast to Carapetyn's testimony that McKibbon had increased the loan from $100 to $900, McKibbon testified that Carapetyn had actually borrowed $900 primarily for

car repairs and car insurance, and that Carapetyn had failed to repay the loan. McKibbon in fact acknowledged that he was so angry at Carapetyn that he said he would beat him, but that he didn't intend it to harm Carapetyn or intend to make an extortionate threat.* This view of McKibbon's mental process is supported by the testimony of Koenig. Koenig had also borrowed money from McKibbon, but had never been threatened, even though he failed to make a payment after regularly complying with the terms of the loan.

The verdict against appellant was a corollary only if Carapetyn was credible. It was agreed by all that appellant had nothing to do with the loan arrangements and was unaware of the loan to Carapetyn prior to August 3, 1972. The record also shows that appellant was not on the scene until August 3, 1973; that until August 4, Carapetyn had no fear of appellant, and that appellant made only one statement which could even remotely be deemed a threat. The latter statement occurred when McKibbon told Carapetyn to leave town if he did not pay by the following week. Carapetyn, knowing he was equipped with a tape recorder then asked, "Is that what you say, Bob?" to which appellant responded that that is what he suggested. There was testimony by Carapetyn and appellant, as well as the agents, that appellant was only in the vicinity of the

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*Section 894 requires knowledge that the threat is extortionate.

conversations, and thus it was possible for the jury to conclude that appellant did not know what was going on or the context of the conversations.

Thus, critical to the case was whether McKibbon intended an extortionate threat and whether appellant heard the language and, rather than believing that the words manifested anger and frustration, understood the language to convey an extortionate threat. Judge Mishler himself recognized the problem when he stated that the Government's case was weak.

In light of this state of the record, Judge Mishler erred in denying certain relief requested by the defense.

A. The Judge should have granted some examination of Carapetyn.

Realizing the significance of Carapetyn's testimony, prior to trial defense counsel requested a mental examination of Carapetyn because of bizarre behavior which demonstrated flights of fancy or an absence of reality. The Government filed a self-serving response, stating that agents had interviewed Carapetyn and found him credible and responsive.

The Judge denied the motion, saying he had no inherent power to order an examination. This ruling was erroneous. The district judge has discretionary authority to order an examination of a witness to determine whether the witness is competent to testify or for the purpose of submitting the doctor's report to the jurors to assist them in determining credibility:

> To assist the court in making its competency decision or to aid the jury in assessing credibility, or to serve both purposes, the trial judge may order a psychiatric examination to obtain expert testimony concerning the degree and effect of a witness' disability. ... [Since there are dangers and] since there is no exact measure for weighing these kinds of dangers against the need for an examination, the decision must be entrusted to the sound discretion of the trial judge in light of the particular facts.
>
> United States v. Benn, 476 F.2d 1127, 1130-31 (D.C. Cir. 1973).

See also Hamilton v. United States, 433 F.2d 526 (D.C. Cir. 1970); United States v. Addonizio, 451 F.2d 49 (3d Cir. 1971).

Even United States v. Dilby, 39 F.R.D. 340 (D.D.C. 1966), cited by both the Judge and the Government as authority for the proposition that the judge has no inherent power to act, the court states that there is discretion to grant an examination on a proper factual showing.

In addition, the court not only has the discretion to order a mental examination, but it can order something less than a mental examination to determine a witness' competence or credibility. Thus, in United States v. Benn, supra, 476 F.2d at 1131, n.15, the court conducted an examination of the witness out of the presence of the jury to determine if she understood the oath and was capable of observing and reporting. Such a procedure would also provide the court with the opportunity to

impress upon the witness the significance of the oath.

Here, the affidavits in support of defense counsel's motion indicated that Carapetyn responded to the actions of his associates by resorting to fantasy. The affidavits state that Carapetyn "found" a non-existent address that other drivers at the car service had sent him to; he charged a passenger in his car an incredibly low rate for a long trip; he participated in the scheme of other drivers to make him a boxer; and he hired a private guard to protect him where he believed his honor was threatened.

The question for Judge Mishler was whether Carapetyn was acting in genuine belief of what the others told him. If so, he had difficulty distinguishing between fact and fantasy. This was, of course, the question raised by Carapetyn's own trial testimony on certain key issues.

After denying the motion made prior to trial, Judge Mishler modified his position just prior to cross examination of Carapetyn. At that time he agreed to let counsel have a psychiatrist observe Carapetyn in the courtroom, to permit counsel to call the psychiatrist as a defense witness, and to pose a hypothetical question to the doctor premised on Carapetyn's courtroom behavior and the activities reported in the affidavits. This relief was inadequate. Carapetyn's direct testimony had been completed and the opportunity for observation of his behavior was thus limited. In addition, an analysis of the truthtelling facility of Carapetyn obviously required an

in-depth interview with more substantial opportunity for observation and conversation than was possible in the courtroom.

Since the Judge's opinion indicated that he improperly viewed his power, and since there was a sufficient factual showing for either an examination by a doctor or the court, it was error to deny the defense motion.

B. It was error to deny the motion for a new trial.

After the trial, the defense made a motion for a new trial on the ground of newly discovered evidence. The evidence was an affidavit by Jack Levine saying that he did not witness McKibbon beat Carapetyn, nor did he tell Carapetyn not to tell anyone about the incident. This affidavit was in direct contradiction to Carapetyn's testimony.

The Judge held a hearing on the motion, at which it was revealed that McKibbon told his lawyer who Jack was on the day Carapetyn gave his testimony, and that although McKibbon and his lawyer were in court all day and worked on the case at night, McKibbon did go to the store prior to the end of the trial. However, the store was closed. McKibbon also said that after the trial he left word in the neighborhood for Levine to call him, and counsel stated that contact was finally made through a girlfriend. Jack Levine also testified at this hearing, and denied seeing McKibbon strike Carapetyn.

Judge Mishler ruled that the evidence was not cumulative, but that due diligence was not used to find it during the trial. In the unique facts here, the Judge has distorted the meaning and requirement of "due diligence." The Government was at least partly to blame for the failure to locate the witness. Prior to trial, during the colloquy about the tapes, the Assistant United States Attorney was asked the identity of the "Jack" mentioned in the tapes. In response, the Assistant United States Attorney advised the Court and defense counsel that "Jack" was irrelevant and not part of the case.* In this posture, the defense properly went no further in pursuing the "Jack" clue.

Further, at the hearing on the motion, the Assistant United States Attorney advised the Court that the Government had never even tried to find "Jack" because only one agent was working on the case. Thus, although the Assistant United States Attorney was allegedly aware some days prior to the trial of the significance of Jack's testimony, the Government had no time to find him. This would also imply that the Government was not aware of Jack's whereabouts, for if the Government had known where Jack was, he could easily and quickly have been located.

Furthermore, if the Government did not know where Jack was, the argument that the defense counsel could have

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*This, of course, strengthens the defense position that Carapetyn's story of the beating was untrue, for by then the Government knew that Carapetyn would testify about a beating at Jack's store.

learned of Jack's whereabouts by asking the Government for his address is disingenuous.*

It seems apparent that if the Government, with all its resources, could not get Jack in time for him to testify at trial on this most significant event, the defense cannot be held to a higher standard. In fact, counsel did make all the effort possible to find Jack, but the efforts were unsuccessful.

In denying the motion for a new trial, Judge Mishler also found that the evidence would not have resulted in a different verdict. An analysis of the record refutes this conclusion.

Levine's testimony would not only have contradicted Carapetyn's on a critical issue, but would have supported the defense. Without credible proof of physical violence,** the jury might well have believed McKibbon's threats were harmless statements made in the heat of anger.

The tapes and transcripts reflecting statements made during an argument do not have the devastating impact on a jury that testimony about the beating must have had. Clearly there is no justification for concluding that the jurors' verdict would not have been different. Judge Mishler acknowledged this situation in his statement at the conclusion of the hearing in which

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*Jack Levine testified that his name was not in the current telephone directory.

**Appellant also challenges the admissibility of Carapetyn's "Shuffles" story, infra at 25.